

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 03, 2016

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA ex
rel. SALINA SAVAGE, SAVAGE
LOGISTICS,

Plaintiffs,

v.

CH2M HILL PLATEAU
REMEDICATION COMPANY,
PHOENIX ENTERPRISES
NORTHWEST (PENW), PHOENIX-
ABC A JOINT VENTURE,
ACQUISITION BUSINESS
CONSULTANTS, JONETTA
EVERANO, JESSICA MORALES,
DOES 1-TX,

Defendants.

No. 4:14-CV-5002-SMJ

**ORDER DENYING MOTIONS TO
DISMISS FIRST AMENDED
COMPLAINT**

Before the Court, with oral argument, are Defendants Jonetta Everano and Jessica Morales' Motions to Dismiss First Amended Complaint, ECF Nos. 88 and 90. Defendants argue that the Complaint fails to state a claim for which relief can be granted and fails to satisfy Federal Rules of Civil Procedure 9(b)'s standards for claims based on fraudulent conduct. Having reviewed the pleadings and the file in

1 this matter, and after hearing oral argument, the Court is fully informed and denies
2 the motions.

3 A. Procedural Background

4 On October 1, 2015, this court denied the motions to dismiss by CH2M Hill
5 Plateau Remediation Company, Phoenix Enterprises Northwest, Acquisition
6 Business Consultants, and Phoenix-ABC A Joint Venture. The Court granted the
7 motions to dismiss brought by Jonetta Everano and by Jessica Morales with leave
8 to amend to provide additional facts necessary to hold them liable for false claims
9 made by the respective businesses they owned in part. ECF 83. The Plaintiffs filed
10 a First Amended Complaint on October 20, 2015. ECF No. 84. Jonetta Everano
11 and Jessica Morales have each filed motion to dismiss the First Amended
12 Complaint. ECF Nos. 88 and 90.

13 B. Factual Background¹

14 CH2M Hill Plateau Remediation Co. (CHPRC) is a prime contractor at the
15 U.S. Department of Energy's Hanford Site. In June 2008, CHPRC was awarded a
16 \$4,515,556,411 Plateau Remediation Contract to continue the environmental
17 cleanup of portions of the Hanford Site. To perform and receive payments for the
18 Plateau Remediation Contract, CHRPC must certify and maintain compliance with

19
20 ¹ The "factual background" section is based on the Complaint's, ECF No. 1, and Amended Complaint's, ECF No. 84, factual allegations, which are assumed true at this time, *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

1 various contract clauses, regulations, and statutes. One of CHPRC's requirements
2 under these governing provisions pertains to subcontracting work to woman-owned
3 small businesses, HUBZone² businesses, and other disadvantaged businesses
4 (collectively referred to as "small, disadvantaged businesses"). Consistent with its
5 statutory, regulatory, and contractual requirements to offer and attract subcontracts
6 for small, disadvantaged businesses, CHPRC submitted in September 2007 its
7 Small Business Subcontracting Plan to the Department of Energy (DOE) as required
8 by the Plateau Remediation Contract, 15 U.S.C. § 637, and FAR 52.219-8 and
9 52.219-9. For fiscal years 2009-13, CHPRC's percentage goal for subcontracting to
10 HUBZone businesses was 3.4% (\$45,614,451), woman owned small businesses
11 was 6.5% (\$88,513,870), and the total planned percentage goal for small,
12 disadvantaged businesses was 7.9% (\$106,956,283). If CHPRC subcontracted work
13 to small, disadvantaged businesses, it avoided fee reductions under the terms of the
14 Plateau Remediation Contract.

15 CHPRC did subcontract Plateau Remediation work to other businesses. A
16 large business it subcontracted work to was FE&C. In order to appear to satisfy its
17 subcontracting goals to small, disadvantaged businesses, while actually awarding
18 contracts to FE&C, CHPRC initiated a scheme along with FE&C to create small
19

20 ² In the Small Business Reauthorization Act of 1977, the United States established a program popularly referred to as HUBZone: Historically Underutilized Business Zone. The enacting regulations are 13 C.F.R. Part 126 *et seq.*

1 businesses, which would merely serve as a small-business facade while FE&C
2 performed the subcontracted remediation work. To carry out this scheme, CHPRC
3 reached out to Jonetta Everano, an FE&C employee, to ascertain whether she was
4 interested in starting a business which would apply for small business contracts for
5 Plateau Remediation work. Ms. Everano agreed to establish a business named
6 Phoenix Enterprises Northwest, LLC (PENW) in February 2009. Ms. Everano held
7 a 51% ownership interest and served as president of PENW, and FE&C held a 49%
8 ownership interest in PENW. On May 12, 2009, PENW was added by CHPRC to
9 its vendor database, Passport, as a woman-owned, minority-owned small business.

10 In the spring of 2009, Washington Closure Hanford (WCH), another Hanford
11 prime contractor, which was awarded the River Corridor Closure Contract by DOE,
12 advertised a subcontract for small businesses: the Truck and Pup S009166A00
13 subcontract (WCH IU 2&6 remediation subcontract). Relator Savage, who owns
14 and operates a trucking business—Savage Logistics, LLC—applied for the
15 subcontract but did not obtain it. WCH awarded the subcontract to PENW.
16 Concerned that PENW was not a small business, Ms. Savage protested PENW's
17 status as a small business to the Small Business Administration (SBA) under the
18 WCH Truck and Pup Contract. The SBA, which is the sole federal agency with
19 authority to determine whether a business concern qualifies as a small,
20 disadvantaged business, determined that PENW was not a small business for

1 purposes of the WCH Truck and Pup Contract because it was affiliated with FE&C:
2 FE&C held 49% ownership interest in PENW; PENW had no assets, employees,
3 address, or telephone number; and PENW shared office space and an insurance
4 policy with FE&C. Accordingly, any remediation work to be done by PENW was
5 to be done by FE&C staff. The SBA issued a formal written decision finding that
6 PENW was not a small business for the identified WCH procurement project.

7 In July 2009, Ms. Savage informed both CHPRC's Procurement manager and
8 director that the SBA determined that PENW was not a small business but rather
9 was FE&C's affiliate and provided a copy of the SBA's size determination letter to
10 CHPRC. Based on their verbal response, it was clear to Ms. Savage that these
11 individuals at CHPRC already knew that PENW was not a small business.

12 In September 2009, CHPRC awarded PENW Contract Number 00039654—another
13 small business contract—notwithstanding knowing that PENW was completely
14 dependent on FE&C's manpower, bonding, insurance, and management and had
15 been deemed not to be a small business for purposes of the WCH procurement
16 project.

17 In July 2010, PENW formed a joint venture with Acquisition Business
18 Consultants, Inc. (ABC), named Phoenix-ABC A Joint Venture ("Phoenix-ABC").
19 The purpose of this venture was to obtain federal contracts as a HUBZone
20 contractor—a contractor who has 35% of its employees residing within any Indian

1 reservation or area adjoining an Indian reservation. *See* 13 C.F.R. § 126.602. ABC
2 is an Alaska corporation owned by Jessica Morales, and was headquartered in
3 Wasilla, Alaska from June 2008 until July 2012. It did not have any employees in
4 Alaska (a HUBZone area) or in Richland (a non-HUBZone area). In July 2012,
5 ABC changed its corporate address to Richland, Washington, and in July 2013, it
6 changed its corporate address to Pasco, Washington. Since 2009, Ms. Morales has
7 worked as a Counselor for Procurement Technical Assistance Centers, a federally
8 chartered association whose counselors were described as experts in the field of
9 small, disadvantaged business eligibility.

10 On August 3, 2010, CHPRC registered Phoenix-ABC as a HUBZone
11 business in its Passport database. However, at that time, CHPRC knew that
12 Phoenix-ABC could not qualify as a HUBZone business because neither member
13 of Phoenix-ABC was a HUBZone certified contractor, as PENW was not a small,
14 woman-owned business, and ABC was not a business established in a HUBZone
15 area as it had no employees in Wasilla, Alaska. Notwithstanding this knowledge,
16 CHPRC awarded a number of HUBZone contracts to Phoenix-ABC beginning in
17 August 2010 and continuing through March 2011. These awards furthered
18 CHPRC's scheme of awarding small, disadvantaged business subcontracts to
19 companies which merely served as a facade for FE&C. In total, CHPRC awarded
20 contracts totaling \$1,495,193.12 to Phoenix-ABC.

1 CHPRC then reported these PENW and Phoenix-ABC contracts as small business
2 and HUBZone contracts to DOE in order to reach its subcontracting goals for small,
3 disadvantaged businesses. In so doing, CHPRC knowingly failed to satisfy
4 certification requirements, such as FAR 52.219-9I(4), which requires CHPRC to
5 “[c]onfirm that a subcontractor representing itself as a HUBZone small business
6 concern is identified as a certified HUBZone small business concern by accessing
7 the Central Contractor Registration (CCR) database or by contacting SBA.”
8 CHPRC received full payment from DOE for “meeting” its Small Business
9 Subcontracting Plan goals.

10 After uncovering similar conduct engaged in by another Hanford area prime
11 contractor and largely the same subcontractors, Ms. Savage brought a qui tam
12 lawsuit (*Savage I*) in May 2010 against Washington Closure Hanford (WCH),
13 PENW, FE&C, and individual employees of each company. *Savage I* alleges that
14 the defendants engaged in a bid-rigging scheme in which WCH allegedly colluded
15 with FE&C to recruit PENW to compete for the Truck and Pup contracts (and
16 unspecified subcontracts) under the River Corridor Closure Contract (RCCC), No.
17 DE-AC06-05RL 14655, at Hanford, and that WCH and PENW thereafter presented
18 false claims for payment to the government. Approximately two years after filing
19 *Savage I*, Ms. Savage amended the *Savage I* complaint to add facts pertaining to
20 WCH’s illegal awarding of contracts to PENW without publication. In September

1 2012, Ms. Savage amended the *Savage I* complaint again to add Phoenix-ABC,
2 Sage Tec LLC, and Laura Shikashio as defendants and other allegations of false
3 claims and false certifications relating to other small business contracts. In
4 December 2013, the United States partially intervened in *Savage I* as to Defendants
5 WCH, FE&C, Sage Tec, and Laura Shikashio. In January 2014, Relator Savage
6 filed a Third Amended Complaint in *Savage I*.

7 While Ms. Savage was reviewing documents produced during the *Savage I*
8 lawsuit, she became aware of Phoenix-ABC's failure to qualify as a HUBZone
9 contractor. Ms. Savage filed this lawsuit (*Savage II*) in January 2014 against
10 CHPRC, PENW, Phoenix-ABC, ABC, Ms. Everano, and Ms. Morales. ECF No. 1.
11 Ms. Savage claims that CHPRC violated the FCA by 1) knowingly awarding
12 contracts set aside for small and HUBZone businesses to businesses that were
13 known not to be small or HUBZone businesses, 2) knowingly failing to verify that
14 both joint venturers were certified HUBZone contractors before awarding over
15 \$1,495,193.12 of sole source HUBZone contracts to ABC-Phoenix, and 3) falsely
16 reporting compliance with laws and regulations in order to receive payment from
17 the United States. Relator Savage alleges that the other Defendants knowingly took
18 advantage of CHPRC's desire to treat them as small and HUBZone certified
19 businesses and agreed to collude with CHPRC by certifying themselves as small,
20 disadvantaged businesses when applying for contracts set aside for such businesses,

1 when they knowingly failed to satisfy such requirements, and then accepting the
2 awarded contract and payments thereunder. The United States elected not to
3 intervene in *Savage II*.

4 C. Dismissal Standards

5 A Rule 12(b)(6) motion to dismiss for failure to state a claim questions
6 whether the plaintiff's claims satisfy Rule 8(a)'s pleading standards. *Navarro v.*
7 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Rule 8 requires the complaint to contain
8 "a short and plain statement of the claim showing that the pleader is plausibly
9 entitled to relief." Fed. R. Civ. P. 8(a)(2); *see Bell Atl. Corp. v. Twombly*, 550 U.S.
10 544, 570 (2007) (setting forth the plausibility standard). Plausibility does not require
11 a probability of success on the merits; instead it requires "more than a sheer
12 possibility" of success on the merits. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
13 To determine whether the complaint contains a statement showing that the pleader
14 is plausibly entitled to relief, the court first identifies the elements of the plaintiff's
15 claim and then determines whether those elements can be proven on the alleged
16 facts. *Id.* at 663. When conducting this analysis, the court accepts the alleged factual
17 allegations in the complaint as true and construes the pleadings in the light most
18 favorable to the plaintiff. *Id.*

19 Defendants also argue that the complaints fail to satisfy Rule 9(b)'s
20 particularity requirement. Rule 9(b) requires a complaint to "state with particularity

1 the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). To satisfy
2 this standard, the fraud-based claims must “be specific enough to give defendants
3 notice of the particular misconduct so that they can defend against the charge and
4 not just deny that they have done anything wrong.” *Vess v. CibaGeigy Corp. USA*,
5 317 F.3d 1097, 1106 (9th Cir. 2003) (quotation and citation omitted). Thus,
6 “[a]verments of fraud must be accompanied by the who, what, when, where, and
7 how of the misconduct charged.” *Id.* (quotation and citation omitted). A party may,
8 however, plead allegations of “[m]alice, intent, knowledge, and other conditions of
9 a person’s mind more generally.” Fed. R. Civ. P. 9(b).

10 A defendant is liable under the FCA if it: “knowingly presents or causes to
11 be presented, a false or fraudulent claim for payment or approval,” 31 U.S.C. §
12 3739(a)(1)(A), or “knowingly makes, uses, or causes to be made or used, a false
13 record or statement material to a false or fraudulent claim,” *id.* § 3739(a)(1)(B). A
14 defendant acts knowingly if it has actual knowledge, deliberate ignorance of the
15 statement, or reckless disregard as to the truth of the statement. *Id.* § 3729(b)(1).
16 “Innocent mistakes, mere negligent misrepresentations and differences in
17 interpretations” do not constitute knowingly false statements. *U.S. ex rel. Hopper*
18 *v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996). The falsity requirement is satisfied if
19 it is an “intentional, palpable lie.” *Id.* A claim is “any request or demand, whether
20 under a contract or otherwise, for money or property and whether or not the United

1 States has title to the money or property,” presented to the United States or to a
2 contractor, if the money or property is to be spent or used on the United States’
3 behalf. 31 U.S.C. § 3729(b)(2). A false statement or course of conduct is material
4 if it impacts the government’s decision to pay out moneys to the claimant. *United*
5 *States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006).

6 Here, the Complaint alleges both express false certifications and implied
7 false certifications were made by the Defendants. An express false certification
8 occurs when a defendant certifies compliance with a law, rule, or regulation as part
9 of the process through which the claim for payment is submitted. *Ebeid ex rel.*
10 *United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). An implied false
11 certification occurs when an entity has previously undertaken to expressly comply
12 with a law, rule, or regulation, and that obligation is implicated by submitting a
13 claim for payment even though a certification of compliance is not required in the
14 process of submitting the claim. *Id.* To prove a false certification, the relator is not
15 required to “identify representative examples of false claims to support every
16 allegation,” rather “use of representative examples is simply one means of meeting
17 the pleading obligation” to allege “particular details of a scheme to submit false
18 claims paired with reliable indicia that lead to a strong inference that claims were
19 actually submitted.” *Id.* at 998-99 (quoting *United States ex rel. Grubbs v.*
20 *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).

1 D. Analysis

2 The Court finds the Amended Complaint's fraud-based FCA claims are plead
3 with sufficient particularity as to put Defendant's Jonetta Everano and Jessica
4 Morales on notice of the alleged fraud and their involvement in the fraudulent
5 scheme.

6 a. Jonetta Everano

7 The Amended Complaint alleges that Ms. Everano, as Manger of Phoenix-
8 ABC, approved billings for HUBZone contracts and received personal financial
9 benefit by reason of those fraudulent billings. The Complaint alleges that during the
10 time that Phoenix-ABC was performing the CHPRC contracts, Ms. Everano signed
11 representations and certifications claiming that Phoenix-ABC was a HUBZone
12 Contractor when she knew this to be false. Further, it is alleges that her own staff at
13 Phoenix-ABC showed her the applicable Federal Acquisition Regulations and SBA
14 Regulations and informed her that Phoenix-ABC was not an eligible HUBZone
15 entity, and after learning that Phoenix-ABC was not eligible for HUBZone awards,
16 Ms. Everano continued to bill and collect money from the HUBZone contracts.
17 Further the Amended Complaint alleges that as part of the application for mentor
18 protégé agreement approval from the Department of Energy, Ms. Everano
19 represented that Phoenix-ABC was a HUBZone qualified small business when she
20 personally knew that it did not qualify. These allegations are sufficient to satisfy

1 Rule 9(b)'s particularity requirement. The allegations go to the time, place, and
2 nature of the alleged fraudulent activities, and thus provides sufficient notion to the
3 Defendant as to alleged fraud.

4 The Motion is denied.

5 b. Jessica Morales

6 The Amended Complaint alleges that Acquisition Business Consultants
7 ("ABC") is owned by Jessica Morales. It further alleges that the organization of
8 Phoenix-ABC was at the suggestion of Jessica Morales, who held herself out to be
9 an expert in regulations and who claimed to have contacts and influence with the
10 ONWB for the DOE in Washington DC. The Amended Complaint alleges that from
11 Ms. Morales's claimed expertise, she knew or was charged with knowledge that the
12 Phoenix-ABC was not eligible to receive HUBZone contract awards. It is further
13 alleged that at all material times Ms. Morales knew that ABC did not maintain a
14 principal office in a HUBZone and was therefore not an eligible HUBZone
15 business. The Amended Complaint alleges that as part of the application for mentor
16 protégé agreement approval from the Department of Energy, Ms. Everano and
17 Jessica Morales represented that Phoenix-ABC was a HUBZone qualified small
18 business when she personally knew that it did not qualify. The new allegations in
19 the Amended Complaint are plead with sufficient particularity because they are
20 statements that go to the time, place, and nature of the alleged fraudulent activities.

1 Thus, they are sufficient to put defendant on notice of her alleged involvement in
2 the fraudulent scheme.

3 The Motion is denied.


4 Accordingly, **IT IS HEREBY ORDERED:**

5 **1.** Defendant Jonetta Everano's Motion to Dismiss First Amended
6 Complaint, **ECF No. 90**, is **DENIED**.

7 **2.** Defendant Jessica Morales' Motion to Dismiss First Amended
8 Complaint, **ECF No. 88**, is **DENIED**.

9 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
10 provide copies to all counsel.

11 **DATED** this 3rd day of February 2016.

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13 SALVADOR MENDOZA, JR.
14 United States District Judge
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